engineer for local information but we are the design engineers and although we discuss with him problems, the last word is with us. We make the final decision."

For these reasons we dismissed this appeal with costs.

Appeal dismissed.

Solicitors: *Chor Pee & Co.; Boswell, Hsieh & Lim.*

WEI GIAP CONSTRUCTION CO. (PTE.) LTD. v. INTRACO LTD.

[A.C.J. (D'Cotta J.) June 22, 1978]

[Singapore — Companies Winding Up No. 86 of 1977]

Companies — Winding-up — Appeal against Winding-up Order — Company with $3 million liability to 150 creditors — Companies Act (Cap. 185), ss. 217(1)(b), 218(1)(c) & (e) and 218(2)(a).

The appellants in this case failed to settle the judgment debt of the sum of $71,570.13 due to the respondents as a result of which the latter obtained an Order for Winding-up against the appellants pursuant to section 217(1)(b) of the Companies Act. The appellants appealed.

It was not disputed that the appellants' total liabilities were about $3 million owing to 150 creditors. An amount of $1,881,601.13 was owed to the appellants by 9 debtors. Of these 9 debtors there were 3 whose total debts amounted to $1,300,000. Of these 3 debtors a Receiving Order had been made against the first debtor for the sum of $266,932 and a Winding-up order was made against the second firm which was alleged to owe the appellants the sum of $27,817. The third debtor claimed that only a sum of $28,000 was owing to the appellant and not $1,087,083 as alleged. The appellants' immovable properties were still mortgaged to the finance company.

Held, dismissing the appeal: (1) the mortgaged properties could not be regarded as assets of the company as the mortgagees were preferred creditors, the unsecured creditors being entitled only to the balance, if any, after payment of the mortgage debt and interest;

(2) in exercising its discretion, the court will have regard for the wishes of the majority of the creditors if they have good reason for opposing the petition;

(3) in the exercise of its discretion it is the duty of the court to weigh all the relevant matters and decide whether the *prima facie* right of the petitioning creditors to an order should give way to the wishes of some creditors who assign no reason for their opposition or who merely state that in their view the appellants might be in a position to pay their debts if allowed to continue to operate;

(4) in this case, there was abundant evidence that the company was insolvent and the opposing creditors had failed to show any good reason for their objection to the Winding-up order being made.

[Editorial Note: An appeal was lodged (Civil Appeal No. 35 of 1978) but was subsequently withdrawn].

Cases referred to:-

(1) *Re: Tweeds Garages Ltd.* [1962] 2 W.L.R. 40.

(2) *Bowes* v. *Hope Life Insurance & Guarantee Co.* (1865) 11 H.L.C. 388.

(3) *P & J Macrae Ltd.* [1961] 1 W.L.R. 229.

COMPANIES WINDING-UP.

Anthony C.S. Yap for the appellants.

Goh Aik-Chew for the respondents.

Cur. Adv. Vult.

D'Cotta J.: A winding up order was made against the appellants on the presentation of a petition pursuant to section 217(1)(b) of the Companies Act (Cap. 185) by the respondents. The ground on which the petitioning creditors is relying for the proceedings herein is found in section 218(1)(e) of the said Act which empowers the court to order the winding-up of a company if the company in question is unable to pay its debts. In sub-section (2)(a) of the same section, it is provided that the company is deemed to be unable to pay its debts if a creditor has served on the company by leaving at its registered office a demand for payment exceeding the sum of $500 and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the creditors' satisfaction.

It is not disputed that

(a) the petitioners obtained judgment against the appellants on the 20th day of April 1977 in Suit No. 933 of 1977 for the sum of $71,570.13 with interest thereon at the rate of 8% p.a. from the date of judgment until the date of payment;

(b) the petitioners by letter dated April 22, 1977 served the said judgment on the appellants together with a demand for payment of the judgment debt;

(c) the appellants have not to date paid the judgment debt or any part thereof;

(d) between April 29, 1977 and May 30, 1977, settlement of the judgment debt by instalments was negotiated and finalised but the appellants defaulted; consequently the petition herein was presented by the petitioners;

(e) the petitioners' papers are in order and were properly filed, advertised and served in compliance with the rules.

It is also not disputed that the appellants' total liabilities are in the region of about $3,000,000 owing to about 150 creditors. There is an amount of about $1,881,601.13 being owed to the company by about 9 debtors. Of these 9 debtors, there are 3 whose total debts amount to about $1,300,000 which call for some comment. The first of the three, Wei Leong Construction Co. are alleged to owe the appellants the sum of $266,932. A receiving order has been made against this firm on July 29, 1977 in Bankruptcy Nos. 869 and 882 of 1976. As regards the next debtor Teng Ta who is alleged to owe the sum of $27,817 a winding-up order was made against this firm in winding-up No. 49 of 1977 on May 27, 1977; such being the position the likelihood of recoverability from these two firms is almost nil except for some dividends which the Official Assignee or Official Receiver might declare in the event of there being any funds. The third debtor is alleged to be the D.B.S. Realty Pte. Ltd. whose indebtedness to the appellants is reputed to be in the region of $1,087,083. However, in a joint affidavit made on November 1, 1977 by Bay Kwee Chai and Loh Chai Chon, two directors and shareholders of the appellants, a sum of $28,000 only is certified as being due for payment by the D.B.S. Realty Pte. Ltd.

There is no evidence whether any payment has been received from the other debtors, or whether even

a demand has been made for payment and apart from the sum of $28,000 allegedly owing by D.B.S. Realty Pte. Ltd. the balance due to the appellants can be written off. While on the subject of creditors and debtors, it is also pertinent to note that a number of creditors whose debts total over $850,000 are supporting the petition while some creditors with debts amounting to $1,000,000 are opposing the petition. It is most difficult to ascertain the exact number of creditors and the amounts involved as many creditors are changing horses in mid-stream so frequently that to pin point with any degree of accuracy is out of the question. Some of the creditors opposing the petition have filed affidavits to the effect that if the appellants were allowed to continue to operate the chances of the creditors recovering what was due to them would be greater. There is also a third category of creditors who I shall quite appropriately designate as neutral in so far as they have not expressed an opinion either way.

There is a further allegation by the appellants that they have a "possible" claim for $3,773,157 against the D.B.S. Realty Pte. Ltd. for damages for breach of contract. A report in this connection was made for the appellants by Mr. Eric Lim Ang Beng Hock, a Chartered Quantity Surveyor. It is not the function of the court to adjudicate upon the merits of this claim but the appellants although placing sole reliance on the claim against the D.B.S. for funds to meet its debts do not appear to have done very much if anything at all towards achieving this objective. One would have thought that a claim so vital on which the continued existence of the appellants depend would have been pursued to the hilt: all that has been done to date is that notice of arbitration was given on September 29, 1977 but no arbitrator has yet been appointed.

Be that as it may, even assuming that the appellants have a *bona fide* claim against the D.B.S., in my view taking into consideration the interests of the members of the company and the interest of the creditors the best person to pursue such a claim on their behalf would be the Official Receiver who is in a position to do it not only expeditiously but with the minimum amount of expenditure.

The appellants are also possessed of immovable properties situate at Lorong H, Telok Kurau and Lorong Marzuki. The former comprises two flats which are about 90% completed; work on them commenced at the end of 1974 and stopped in March 1977. The appellants value this property at $350,000. The premises are mortgaged to Nanyang Finance Co. Ltd. for $150,000 with interest at the rate of $2,500 per month. This property was put up for sale by auction and the highest bid received was $154,000. Needless to add the property was not sold.

Property at Lorong Marzuki consisting of 6 Terrace Houses was valued in August 1976 at $695,000. This property is mortgaged for $450,000 with interest and like the Telok Kurau property is uncompleted. With the downward trend in the value of properties in Singapore generally, in my view the mortgagees of both properties who are secured creditors, should consider themselves most fortunate if they recovered their respective mortgage debt together with the interest thereon. These mortgaged properties cannot be regarded as assets of the company as the mortgagees are preferred creditors, the unsecured creditors being entitled only to the balance, if any, after payment of the mortgage debt and interest.

The appellants claimed to have pledged certain property comprising 5 Units Truck Mixer, a portable compressor, a commet pump valued at $275,000 with the First Oversea Credit Ltd. Counsel for the petitioners has described this transaction as a sham Hire Purchase Agreement and an illegal transaction to which counsel for the appellants has conceded. To say the least, this is a shady transaction and if a claim does exist once again I feel the proper person to pursue it would be the Official Receiver.

Finally in their latest affidavit dated October 18, 1977 the said Messrs. Bay Kwee Chai and Loh Chai Chon state —

> "If the company is not wound up, it is our intention to reorganise the company and to seek fresh capital and to tender for fresh contracts. In this respect, we wish to inform the court that we need only one big contract to pull the company out of its financial difficulty provided financial aid is forthcoming. It is our intention to solicit the help of big hardware and building material suppliers to support us by giving us material on long term credit either on profit sharing basis or upon terms of payment of interest."

The petition herein was presented pursuant to section 217(1)(b) of the Companies Act which states that a company may be wound up under an order of court on the petition of any creditor. The ground on which the petitioning creditors is relying is found in section 218(1)(e) of the said Act which empowers a court to order the winding-up of a company if the company in question is unable to pay its debts.

At the outset of his submission, counsel for the appellants admitted with absolute candour that the company (the appellants) was commercially insolvent. In this connection *Buckley* on the Companies Act, 13th Edition at page 460 has this to say: —

> "In such a case it is useless to say that if its assets are realised there will be ample to pay 20 shillings in the pound; This is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it has no assets available to meet its current liabilities it is commercially insolvent and may be wound up."

The aforesaid passage was quoted with approval by Plowman J. in *Re: Tweeds Garages Ltd.*[1] and also by Rajah J. delivering the judgment of the Court of Appeal in *Re: Sunshine Securities Pte. Ltd.*[2]

Once it is established that the appellant company is insolvent, the law relating to its winding-up is clearly stated in *Gore-Browne* on Companies, 43rd Edition at 31-17 as follows: —

> "If the petition for winding up is presented by a creditor whose debt exceeds £50, and is presently due, and it is shown that the company cannot pay its debts, it is almost a matter of course that the court will make the order desired, for this is his right unless other creditors oppose, when the court should have regard to the wishes of the majority."

The above view is supported by the case of *Bowes* v. *Hope Life Insurance & Guarantee Co.*[3] where Lord

Cranworth in his judgment at page 402 had this to say —

"It is not a discretionary matter with the court when a debt is established and not satisfied, to say whether the company shall be wound up or not, that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively that no case could occur in which it would be right to refuse it; but, ordinarily speaking, it is the duty of the court to direct the winding up."

It is conceded that the court has an overriding discretion as to whether a winding-up order should be made but, as respectfully suggested by *McPherson* in the Law of Company Liquidation at page 59, the court's power to refuse an order is fairly strictly regulated and is exercised in accordance with principles which are relatively well-defined.

Now section 289 of the Companies Act provides that regarding matters pertaining to the winding-up of a company, the court may have regard to the wishes of the creditors and to the value of each of their debts for the purposes of determining whether a winding-up order should be made. The position with regard to the creditors opposing the petition has also been expressed in *Palmer's* Company Law, 20th Edition at page 701 where after considering the petitioning creditors' right to a winding-up order the following view is expressed —

"This right to a winding up order is, however, qualified by another rule, viz. that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding up order, the court in its discretion may refuse the order."

From the above text, it does appear that in exercising its discretion, the court will have regard for the wishes of the majority of the creditors if they have good reason for opposing the petition.

On this question, I would like to refer to the case of *P & J Macrae Ltd.*[4] In this case, the petitioners had obtained judgment for the sum of £685 which had not been paid; there were 11 supporting creditors to the extent of £2,136, 6 of whom were for under £100 and 2 for under £50; there were 42 opposing creditors to the extent of £19,000. The opposing creditors apart from expressing their desire to oppose the petition, did not assign any reason therefor. It was held by the Court of Appeal that the court had a complete and unfettered discretion in determining whether to make a winding-up order and that an Appellate Court would only interfere where the judge has exercised his discretion on the wrong principle; the bare fact of the opposing creditors being in a majority was not of itself sufficient, still less conclusive, to require a judge to exercise a discretion in their favour. In his judgment at page 236 *et. seq.*, Willmer L.J. has this to say —

"In the present case the opposing creditors have not seen fit to explain the reason for their opposition. If they have good reasons then the least they could do was to tell the court what those reasons are."

In the exercise of its discretion it is the duty of the court to weigh all the relevant matters and decide whether the *prima facie* right of the petitioning creditors to an order should give way to the wishes of some creditors who assign no reason for their opposition or who merely state that in their view the appellants might be in a position to pay their debts if allowed to continue to operate.

In the instant case, the appellants are unable to pay the debts of the petitioning creditors; in addition to that their total liabilities amount to about $3 million. They made arrangements to liquidate their debts but despite time having been given them they failed to live up to their promises. It is not disputed that they have not carried on business since June 1977 and by the provisions of section 218(1)(c) the court has a discretion whether or not to make a winding-up order where a company has suspended business for a whole year.

In their affidavit of October 18, 1977 the said Messrs. Bay Kwee Chai and Loh Chai Chon state —

"It is our intention to solicit the help of big hardware and building material suppliers to support us by giving us material on long term credit either on profit sharing basis or upon terms of payment of interest."

The only inference that can be drawn is that the appellants have no assets whatever and no current source of income and in order to continue to operate they will have to raise funds and probably create further indebtedness. It is also quite obvious that any loans to the appellants in view of its financial position must surely be secured by its assets as one cannot envisage a lender granting an unsecured loan in the circumstances: such a step would be to the detriment of the unsecured creditors.

In this case there is in my judgment abundant evidence that the company is insolvent and I so find. The opposing creditors have failed to show any good reason for their objection to the winding-up order being made. For the reasons abovementioned, I ordered that the company be wound up.

Order accordingly.

Solicitors: *Shook Lin & Bok; Goh Aik-Chew.*

NATIONAL JAYA (PTE.) LTD. v. HONG TAT MARINE SHIPPING PTE. LTD.

[O.C.J. (Wee Chong Jin C.J.) November 9, 1978]
[Singapore — Suit No. 4351 of 1975]

Shipping Law — Carriage of Goods by Sea — Rights and immunities — Hague Rules Article IV r. 5 — Scope of — "In any event" — Meaning of — Applicability of Article III r. 1 of Hague Rules — Whether Articles IV r. 5 applied to limit liability — Carriage of Goods by Sea Act (Cap. 184).

Bill of Lading — Evidence of contract of carriage by sea.

The plaintiffs in this case had marble slabs and glass mosaic worth $28,768 to send to Jakarta. The defendants agreed to ship them from Singapore to Merak, a port near Jakarta on the vessel "Hai Sing", and issued a Bill of Lading for these goods. The value of the goods was not declared by the plaintiffs before shipment and not inserted in the Bill of Lading.

The "Hai Sing" was a barge with no movable rudder. It had no steering power and was being towed by another vessel also belonging to the defendants. Its deadweight was approximately 800 metric tons but it was in fact carrying 966 metric tons of cargo on the said voyage to Merak. On approaching Merak, the tug had to anchor to await clearance the next day and proceeded to shorten the tow line. During